



4121 Wilson Boulevard, Suite 1000
Arlington, Va. 22203
(703) 351-2000



10 G Street, NE, 7th Floor
Washington, DC 20002
(202) 551-0025

December 1, 2005

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands***
WT Docket No. 03-66
WRITTEN EX PARTE PRESENTATION

Dear Ms. Dortch:

Throughout this proceeding, participants representing rural BRS/EBS operators have urged the Commission to permit certain multi-channel video programming distributors ("MVPDs") to automatically "opt out" of a transition to the new band plan. In addition to supporting the "opt-out" proposal initially proposed by the Wireless Cable Association International, Inc. ("WCA"), the National ITFS Association and the Catholic Television Network (collectively, the "Coalition"),¹ the BRS Rural Advocacy Group (the "Group") and Central Texas Communications, Inc. ("CTC") developed a criterion that would allow a narrow class of MVPDs to "opt out" if the licensees were based in "rural areas" and met other thresholds demonstrating service to a critical mass of subscribers. The National Telecommunications Cooperative Association ("NTCA") and the Rural Telecommunications Group, Inc. ("RTG") jointly submit this written presentation to offer a comprehensive plan by which the Commission could fairly administer the process by which the interests of operators that want to transition and those that do not can be effectively managed in a balanced and flexible manner.

NTCA. Established in 1954 by eight rural telephone companies, today NTCA represents 560 rural incumbent local exchange carriers. All of NTCA's members are full service local exchange carriers and many members also provide cable, Internet, satellite and long distance services to their

¹ See "A Proposal for Revising the MDS and ITFS Regulatory Regime," filed Oct. 7, 2002 by the Wireless Communications Association International, Inc., the National ITFS Association and the Catholic Television Network ("Coalition Proposal") App. B at 17; Supplement to Coalition Proposal (filed Nov. 14, 2002) at 4-5.

communities. About half of NTCA's members are also wireless providers and many more are looking for new wireless opportunities. NTCA members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

RTG. RTG is a trade association dedicated to promoting wireless opportunities for telecommunications companies in rural America. Its members are small businesses that have joined together to speed delivery of new, efficient, and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG's members include both independent wireless carriers and wireless carriers that are affiliated with rural telephone companies.

In its October 14, 2005 presentation, WCA acknowledged its appreciation for the desire of rural MVPDs to continue providing MVPD services to the public, but asked the Commission to consider the merits of their cases for opting out in individualized waiver requests.² In their initial petitions for reconsideration,³ the Group and CTC observed that, in adopting a waiver process for any licensee that desired to not participate in a transition, the *BRS/EBS Order*⁴ did not provide any helpful guidelines on what the Commission would look upon favorably when it considered waiver requests. They also identified numerous problems and unanswered questions raised by a waiver process, especially the costs to prepare a waiver request, the uncertainty in the outcome for both the waiver proponent and the transitioning licensees, and delays and FCC staff burdens associated with issuing a decision.

In various ex parte presentations, rural interests demonstrated that in the "case study" of W.A.T.C.H. TV Company, these fears had unfortunately been realized.⁵ Based on this case, NTCA and RTG question whether waiver requests will be processed in a timely and predictable manner as will be necessary to foster investment and provide certainty to the transition process. For these reasons, NTCA and RTG agree that qualifying rural MVPDs should be eligible to automatically opt out of a transition to the new band plan upon satisfying the specific criteria they have proposed.

As an alternative to waivers, WCA advocated adoption of the Commission's proposal that would permit analog MVPDs to exchange their analog Lower Band Segment ("LBS") and Upper Band Segment ("UBS") spectrum for digital facilities in the Middle Band Segment ("MBS") to allow continued transmission of a comparable number of programming streams, with financial support to be provided by the winner of the auction for the vacated LBS and UBS spectrum.⁶ Although the Group and CTC have voiced support for this proposal generally, NTCA and RTG believe that, in light of WCA's conditioned endorsement, the Commission should adopt a comprehensive process

² See Letter from Paul J. Sinderbrand, Counsel to WCA, to Marlene H. Dortch, WT Docket No. 03-66 (filed Oct. 14, 2005) ("WCA Letter").

³ See Petition for Partial Reconsideration of the BRS Rural Advocacy Group, WT Docket No. 03-66 (filed Jan. 10, 2005) at 9-14; Petition for Reconsideration of Central Texas Communications, Inc., WT Docket No. 03-66 (filed Jan. 10, 2005) at 7-10.

⁴ See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking* FCC 04-135, 19 FCC Rcd 14165 (2004) ("*BRS/EBS Order*"). The Further Notice of Proposed Rulemaking portion of the document will be referred to as the "*FNPRM*."

⁵ See Letter from Donald L. Herman, Jr. to Marlene H. Dortch, WT Docket No. 03-66 (filed Oct. 11, 2005); Letters from Stephen E. Coran and Donald L. Herman, Jr. to Marlene H. Dortch, WT Docket No. 03-66 (filed Oct. 6, 2005).

⁶ See *FNPRM* at 14273, 14280-81.

by which MVPDs could exercise their opt-out, waiver and spectrum exchange rights. We thus propose the following:

- As initially proposed by WCA⁷ and WATCH TV,⁸ a licensee eligible to opt out under pre-established criteria (and any co-located licensee) would file a certification with the Commission demonstrating opt-out eligibility within 30 days of the effective date of new rules adopted in this proceeding. After reviewing the opt-out certifications, the Commission would publish a list of those licensees deemed eligible to opt out of a transition.⁹ As noted below, even in cases where a licensee is eligible to opt out, it may still want to participate in a transition if the Initiation Plan accommodates its service objectives.
- Within 30 days from the release of the published list of licensees eligible to opt out, a licensee that did not qualify could file a request for waiver of the transition rules. As emphasized above, the order would provide guidelines on the factors the Commission would favorably consider in evaluating waiver requests.
- The Commission would issue a public notice listing the waiver requests it received. Parties with standing would have 15 days to oppose a waiver request, and the waiver proponent would have 10 days to reply.
- The Commission would issue a decision within 60 days from the last-filed pleading granting the waiver in whole or in part or denying the waiver request.
- As proposed by BellSouth, on or before the 30th day of the Transition Planning Period, any licensee deemed eligible to opt out could either participate in the transition or file a notice with the Commission that it is opting out of a transition.¹⁰
- Consistent with the views expressed by CTC and BellSouth, a licensee deemed eligible to opt out could itself initiate a transition at any time before the end of the period for filing an Initiation Plan.¹¹ Similarly, a licensee that either opted out or obtained a waiver could, as part of the transition process, agree to relocate its analog operations to digital spectrum in the MBS, if the transition proponent and/or other licensees were willing to pay the costs associated with such relocation. This process would encourage flexibility and expedite transitions by clearing the LBS and UBS bands, yet afford the analog MVPD an early opportunity to migrate to more efficient digital operations in the MBS.

⁷ See WCA Petition for Reconsideration, WT Docket No. 03-66 (filed Jan. 10, 2005) (“WCA Petition”) at 26-27.

⁸ See Petition for Reconsideration of W.A.T.C.H. TV Company, WT Docket No. 03-66 (filed Jan. 10, 2005) (“WATCH TV Petition”) at 6. See also Consolidated Reply to Oppositions or Petitions for Reconsideration of BellSouth Corporation, *et al.*, WT Docket No. 03-66 (filed March 9, 2005) (“BellSouth Reply”) at 11-12.

⁹ See WCA Petition at 26-27; WATCH TV Petition at 6. As discussed by BellSouth, “[a]ny licensee filing an ‘opt-out’ certification would be required to respond to data requests so that the transition proponent may either ‘plan around the ‘opting out’ licensee, or seek solutions that would allow the licensee to participate in the transition process consistent with its MVPD plans.’” BellSouth Reply at 11-12.

¹⁰ *Id.* at 12.

¹¹ See Reply to Opposition to Petition for Reconsideration of Central Texas Communications, Inc., WT Docket No. 03-66 (filed March 9, 2005) at 11; BellSouth Reply at 12.

- As proposed by the Group, at the beginning of the self-transition period,¹² any licensee that did not participate in a transition (whether by opting out or waiver), could elect to either: (a) transition its channels to the new band plan; (b) exchange all of its spectrum for bidding credits; or (c) vacate its analog LBS and UBS spectrum in exchange for financial assistance to migrate operations to digital spectrum in the MBS that would permit an equivalent number of programming streams at the same or better quality.¹³
 - In cases where the auction for “white area” LBS and UBS spectrum has occurred as of the election date, the analog MVPD operator selecting the digital exchange option would be required to relocate operations to the MBS subject to the financial assistance rules adopted by the Commission.
 - In cases where the auction for “white area” LBS and UBS spectrum has not occurred as of the election date, any licensee selecting the digital exchange option would not be permitted to actually exchange its LBS/UBS license for an MBS spectrum license until a new licensee has been selected for the vacated LBS and UBS channels in the area, thereby assuring the analog MVPD that it would be compensated for the digital technology upgrade.¹⁴
 - In cases where the auction for “white area” LBS and UBS spectrum has occurred as of the election date but no auction participant has bid for the spectrum, any licensee selecting the last option could continue to operate “as is” subject to any opt-out or waiver relief it obtained.

With the adoption of this process, the Commission need not adopt WCA’s proposal to require a licensee to offer to return its LBS and UBS spectrum for auction as a condition precedent to seeking opt-out or waiver relief. This would cut off the rights of transition proponents to negotiate solutions that might lead to more-inclusive transitions and eliminate opportunities for MVPDs to self-transition at a later date if market demands warrant.

¹² This assumes that a self-transition period would occur following the deadline for filing the Initiation Plan.

¹³ See the Group’s Consolidated Opposition to and Comments in Support of Petitions for Reconsideration, WT Docket No. 03-66 (filed Feb. 22, 2005) (“Group Opposition”) at 12-13. This would be consistent with the “comparable facilities” doctrine the Commission typically uses in relocating licensees to other facilities. See, e.g., *Microwave Cost Sharing First Report and Order and Further Notice of Proposed Rule Making* 11 FCC Rcd 8825 (2000).

¹⁴ See Group Opposition at 13.

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, this notice is being filed electronically.

Please contact the undersigned if there are any questions.

Respectfully submitted,

/s/ Jill M. Canfield

Jill M. Canfield

General Counsel

National Telecommunications Cooperative Association

/s/ Jessica H. Bridges

Jessica H. Bridges

Chief Executive Officer

Rural Telecommunications Group, Inc.

cc: Fred Campbell
Barry Ohlson
John Giusti
John Branscome
Catherine Seidel
Uzoma Onyeije
Joel Taubenblatt
Cathleen Massey
John Schauble